No. 89-260

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF IDAHO,

Petitioner,

—v.—

LAURA LEE WRIGHT,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF IDAHO

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

The epidemic in reported cases of child abuse represents a national tragedy that creates strong pressure to depart from the traditional safeguards afforded criminal defendants. This case reflects those pressures and therefore raises issues of organizational concern to the ACLU.

SUMMARY OF ARGUMENT

This case presents the question whether a state's strong interest in protecting its young children from sexual abuse justifies dispensing with a defendant's Sixth Amendment right to confrontation. Past opinions in which the Court has balanced the need of the prosecution and the risk to the accused establish that a state's desire to obtain convictions more easily does not outweigh the defendant's right to be safeguarded against unreliable evidence. When the rationale of these decisions is applied to the facts of this case, the opinion of the Idaho Supreme Court reversing defendant's conviction on constitutional grounds must be affirmed.

Statements made by a two and one-half year old child to a physician selected by the police could not be used against the defendant without violating her Sixth Amendment rights to a fair trial. They were elicited by an agent of the prosecution after the prosecution had

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[1]Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

focused on the defendant, and after the child-declarant had been in the custody of the police overnight. The Confrontation Clause protects against prosecution by *ex parte* evidence. Any suggestion to the contrary raises the specter of Sir Walter Raleigh and has implications beyond the child abuse context. *California v. Green*, 399 U.S. 149, 155 (1970).

Here, defendant was denied her right to confrontation because admission of the statement in the absence of the child affected the jury's ability to assess the evidence accurately. Although this Court has found that some "firmly rooted" hearsay exceptions automatically satisfy the Confrontation Clause, it has never held that the overlap between the hearsay rule and the requirements of the Confrontation Clause is complete. *United States v. Inadi*, 475 U.S. 387, 393, n.5 (1986). The hearsay statement used against the defendant in this case is not admissible pursuant to any "firmly rooted" exception, nor indeed pursuant to any class of hearsay exception recognized by the legislature or judiciary of the state of Idaho. Under these circumstances, the Sixth Amendment requires further judicial scrutiny of the child's statement to determine whether the statement may be used if the child is not produced at trial. Given the age of the child, the circumstances of the interview, the nature of the statement, and the role of the physician, the hearsay statement must be excluded as unreliable.

To safeguard against the admission of unreliable hearsay in this and similar cases, *amicus* proposes a prophylactic rule barring trial testimony based on unrecorded interviews with young children by the prosecution or its agents. Otherwise, defendants will not be meaningfully able to challenge the child's statements at trial as required by the Confrontation Clause. Allowing statements obtained in this manner to be admitted creates an intolerable risk of an erroneous conviction. Furthermore, licensing the use of unrecorded statements would unduly encourage the police to succumb to public pressures to prosecute alleged child sex offenders without taking effective measures to ensure the reliability of the statements obtained.

ARGUMENT

I. A CHILD'S HEARSAY STATEMENT THAT IS ADMISSIBLE PURSUANT TO A STATE'S RESIDUAL HEARSAY EXCEPTION IS INADMISSIBLE FOR PURPOSES OF THE CONFRONTATION CLAUSE IF THE CHILD'S FAILURE TO TESTIFY PREVENTS THE JURY FROM ACCURATELY ASSESSING THE EVIDENCE

The Confrontation Clause of the Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This Court has "long rejected as unintended and too extreme" a literal interpretation of the Clause that would "abrogate virtually every hearsay exception" by requiring the exclusion of any statement not made in court and not subject to cross-examination. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). On the other hand, this Court has consistently rejected the notion that all statements that satisfy a hearsay exception simultaneously satisfy the dictates of the Confrontation Clause. *See Dutton v. Evans*, 400 U.S. 74, 86 (1970); *California v. Green*, 399 U.S. at 155-56. *See also Lee v. Illinois*, 476 U.S. 530 (1986). A contrary approach would allow legislators and rule-makers immunity from constitutional scrutiny whenever they create a new hearsay exception.

This Court has acknowledged that certain categories of hearsay exceptions are so "firmly rooted" that a court need not subject evidence admitted pursuant to such an exception to further scrutiny to determine if it passes constitutional muster. *Bourjaily v. United States*, 483 U.S. 171, 182-84 (1987); *Ohio v. Roberts*, 448 U.S. 56 (1980). The state's need and the danger that unreliable evidence

will be used against the accused have already been balanced in the gradual evolution of the exception. *See Mattox v. United States*, 156 U.S. 237, 243-44 (1895); *Bourjaily*, 483 U.S. at 183. That is not the case, however, with the residual hearsay exception relied on by petitioner here.

A. The Hearsay Statements At Issue Do Not Fall Within A Firmly Rooted Exception

The hearsay statements at issue in this case were made by a two and a half year old child after she had been in police custody overnight. *State v. Giles*, P.2d 191, 192 (Idaho 1989). They were elicited by a physician, chosen by the police, who knew that the police suspected that the child had been sexually abused by her father. Briet for Petitioner at 5. The physician did not make any verbatim record of the interview and discarded the drawing he used in questioning the child. *State v. Wright*, 772 P.2d 1224, 1230 (Idaho 1989). He acted as an investigator for the police by making notes for later use in the criminal process. The specific questions he asked focused exclusively on the child's activities with her father. J.A.122-23. *See also* J.A.117, 124.

The statements elicited through this process were not admitted pursuant to any of the common law hearsay exceptions that are codified in Idaho's Rules of Evidence.[2] Rather, they were admitted pursuant to the so-called residual exception in Rule 803(24), a rule identical to the similarly numbered provision in the

[2]The prosecution originally sought to justify admission pursuant to Idaho Rule 803(4), Statements for Purposes of Medical Diagnosis or Treatment, but the trial judge relied exclusively on Idaho Rule 803(24) (J.A.112-15). The extension of the medical exception to statements of identity is an innovation in child sex abuse cases and is not a "firmly rooted" aspect of the exception. Consequently, the "resemblance" noted in the Brief of the United States as *Amicus Curiae* at 18 is not relevant to constitutional analysis.

Federal Rules of Evidence. Unlike the firmly rooted hearsay exceptions with which the courts have had centuries of experience,[3] a codified residual hearsay exception has existed for less than twenty years in any jurisdiction.[4] Furthermore, the residual exceptions were designed to accommodate *ad hoc* instances of reliable statements; they were not intended as a vehicle for the judicial creation of additional categories of hearsay exceptions.[5]

Since the child's statement in this case was offered pursuant to a non-firmly rooted exception, it is "presumptively unreliable and inadmissible for Confrontation Clause purposes." *Lee*, 476 U.S. at 543. Accordingly, it "must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. at 66.

B. A Judicial Finding Of Circumstantial Guarantees Of Trustworthiness For Evidentiary Purposes Does Not Foreclose Constitutional Scrutiny

The state's argument that a finding of trustworthiness for purposes of the residual hearsay exception disposes of the defendant's constitutional rights assumes an

[3]*See e.g., Mattox*, 156 U.S. at 243 (dying declarations have "from time immemorial . . . been treated as competent testimony"); *Bourjaily*, 483 U.S. at 183 ("the co-conspirator exception to the hearsay rule is steeped in our jurisprudence;" "[t]he admissibility of co-conspirators' statements was first established in this Court over a century and a half ago"); *Lee*, 476 U.S. at 551-52 (Blackmun, J., dissenting)("statements squarely within established hearsay exceptions possess 'the imprimatur of judicial and legislative experience' . . . and that fact must weigh heavily in our assessment of their reliability for constitutional purposes")(citation omitted).

[4]The Idaho Rules of Evidence became effective in 1985.

[5]Senate Committee on the Judiciary, Report on Federal Rules of Evidence, 93d Cong. 2d Sess. Report No. 93-1277, p.20 (1974)("Such major revisions are best accomplished by legislative action").

unwarranted congruence between the operation of the hearsay rule and the Confrontation Clause. *California v. Green*, 399 U.S. at 155 ("Our decisions have never established such a congruence"). In making a Rule 803(24) determination of trustworthiness, whether in a civil case or in a criminal case, and regardless of whether the evidence is being offered for or against the accused, the court must answer only one question: Does the proffered statement possess characteristics of trustworthiness equivalent to the trustworthiness that led to the creation of the class exceptions in the hearsay rules?[6]

The Confrontation Clause asks a different question: Will the defendant be deprived of the fair trial guaranteed by the Sixth Amendment[7] if hearsay evidence is admitted against him and the declarant does not testify? A trial court's finding that the statement in question possesses attributes considered significant in the development of traditional exceptions to the hearsay rule does not dispose of this inquiry. In order to determine if the child's absence is excused, the court must consider how

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[6]*See* Tribe, "Triangulating Hearsay," 87 Harv.L.Rev. 957 (1974) (explaining that exceptions are created when the dangers of either ambiguity or insincerity or erroneous memory or faulty perceptions are minimized, but that the exceptions do not require absence of all of these dangers); Jonakait, "Restoring the Confrontation Clause to the Sixth Amendment," 35 UCLA L.Rev. 557, 607 (1988)("While . . . hearsay [admitted pursuant to an exception] may be more reliable than hearsay generally, the lessened chance of mistake does not guarantee that the accused's cross-examination of the declarant would not have helped his case").

[7]In *Pointer v. Texas*, 380 U.S. 400, 405 (1965), this Court explained its holding that the Sixth Amendment right to confrontation is obligatory on the states through the Fourteenth Amendment: "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *See also Strickland v. Washington*, 466 U.S. 668, 685 (1984), and *Faretta v. California*, 422 U.S. 806, 818 (1975).

the Confrontation Clause functions.

This Court has consistently recognized accurate factfinding as the central concern of the Confrontation Clause. *Tennessee v. Street*, 471 U.S. 409, 415 (1985) ("the Confrontation Clause's very mission [is] to advance 'the accuracy of the truth-determining process in criminal trials'"), *quoting Dutton v. Evans*, 400 U.S. at 89. The Confrontation Clause aids the jury in accurate factfinding by ensuring "the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness's demeanor." *United States v. Owens*, 108 S.Ct. 838, 843 (1988). "The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Lee*, 476 U.S. at 540.

This Court has on numerous occasions explained how these "traditional protections" enable the jury to assess the evidence against the defendant. "Compelling [the witness] to stand face to face with the jury in order that they may look at him [enables the jury to] judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Kentucky v. Stincer*, 482 U.S. 730, 736-37 (1987), *quoting Mattox v. United States*, 156 U.S. at 242-43. The oath impresses the witness "with the seriousness of the matter." *California v. Green*, 399 U.S. at 158. And most notably, cross-examination, "the greatest legal engine ever invented for the discovery of truth"[8] "call[s] to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985).

Confrontation ensures that the trier of fact will have "a satisfactory basis for evaluating the truth of the prior statement." *California v. Green*, 399 U.S. at 161. *See also Owens*, 108 S.Ct. at 843. The right to confrontation

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[8]*California v. Green*, 399 U.S. at 158, *quoting* 5 Wigmore, § 1367.

therefore is integral to the Sixth Amendment guarantee of the accused's right to trial by jury. When the value of a hearsay statement depends upon an assessment of the declarant's understanding of the obligation to tell the truth and her ability to tell the truth, dispensing with the "traditional protections" forfeits the defendant's right to have guilt determined by a jury of his peers.

In *Kentucky v. Stincer*, 482 U.S. 730, this Court found that a defendant, accused of sodomizing two young children, had not been deprived of his right to confrontation when he was excluded from an in-chambers hearing at which the court determined the children's competency to testify. According to the majority, the crucial question was "whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination." The Court's description of defendant's ability to bring infirmities in the witnesses' testimony to the attention of the jury paints a picture markedly different from the trial in the instant case:

> After the trial court determined that the two children were competent to testify, they appeared and testified in open court. At that point, the two witnesses were subject to full and complete cross-examination, and were so examined . . . Any questions asked during the competency hearing, which respondent's counsel attended and in which he participated, could have been repeated during direct examination and cross-examination of the witnesses in respondent's presence . . . At the close of the children's testimony, respondent's counsel, had he thought it appropriate, was in a position to move that the court reconsider its competency rulings on the ground that the direct and cross-examination had elicited evidence that the young girls lacked the basic requisites for serving as competent witnesses. Thus, the critical tool of cross-examination was available to counsel as a means of establishing that the witnesses were not competent to testify, as well as a means of undermining the credibility of their testimony.

Id. at 740-44.

In this case counsel was not present when Kathy made her statements, and defendant never had the opportunity to cross-examine her.

C. The Jury In This Case Could Not Assess Accurately The Child's Out-of-Court Statement

The statements made by Kathy to Dr. Jambura lie at the heart of this case. Yet, for a number of reasons, the jury could not assess their reliability with any degree of confidence. As a result, the admission of Kathy's out-of-court statement deprived defendant of her right to confrontation.

1. The Nature Of The Declarant

Kathy Wright was two and one-half years old at the time she allegedly made the statements to which Dr. Jambura testified. Because the jury neither saw nor heard her, it never had the opportunity to assess whether this two and one-half year old child had reached a developmental stage in which she could understand the need to tell the truth, or could distinguish fact from fantasy. By contrast, this issue remains open throughout the trial when the child testifies, *Stincer*, 482 U.S. at 744, even if the court originally finds the child capable of testifying truthfully. *See* Idaho Rules of Evidence 603.

The jury in this case was also unable to evaluate

Kathy's capacity for communicative speech,[9] a skill in which children markedly differ.[10] Significantly, the trial judge held Kathy to be incompetent pursuant to Idaho Rules of Evidence 601, which defines as incompetent "[p]ersons whom the court finds to be incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." This ruling suggests, at the very least, that Kathy's credibility may have been suspect at the time of the interview.

It is noteworthy, therefore, that the jury could not observe the manner in which Kathy spoke about "playing" with her father who, according to the prosecution's case, had forcibly raped her two to three days prior to her statement. J.A.106. Would the jurors have found this allegation believable if they had viewed the child's affect when she described her activities with "Daddy"? Factors such as the speed and flow of a witness' speech, as well as articulation, intonation, mannerisms of speech and use of nonverbal modes of communication, on direct and on cross-examination, enter into a jury's assessment. In evaluating suggestibility, a problematic issue with small children, the jury could have considered the child's reaction to unrestricted leading questions on cross-examination. *Owens*, 108 S.Ct. at 843 (no inquiry as to reliability required "when a hearsay declarant is present at trial and subject to unrestricted cross-examination"). Here, it is not even clear from the doctor's testimony precisely what words Kathy used.

Children's statements are often unreliable. Specific questions addressed to a young child may elicit inaccu-

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[9]The voir dire of Kathy Wright (six months after her interview with Dr. Jambura), indicates that she had a great deal of difficulty in responding to simple questions. For example, when asked how old she was, she first responded, "Kathy Wright" and then stated she was six years old. (J.A.33-34 and *see generally* J.A.32-39.)

[10]Brief of *Amici Curiae* American Professional Society on the Abuse of Children *et al.* at 11 [hereinafter Myers Brief].

rate statements because of a child's susceptibility to suggestion,[11] especially in response to leading questions,[12] and because the child may seek to please the interviewer, particularly if he is a figure in authority.[13] Moreover, the child may "confabulate," that is fill in the story with details from the imagination, and remember her response rather than the event,[14] making effective cross-examination far more difficult even when the child is available to testify.

The Myers *amicus* brief filed on behalf of the state concedes that very young children may pose a greater danger of suggestibility.[15] It chides the Idaho court for not citing recent studies that show that children's hearsay statements are more reliable than researchers previously thought.[16] These studies do not demonstrate the kind of

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[11]*See* Goodman and Clarke-Stewart, "Suggestibility in Children's Testimony: Implications for Child Sexual Abuse Investigations" 16, in *Children's Suggestability (with Special Reference to a Child Witness)* (J. Doris, ed., in press); Cohen & Hernick, "The Susceptibility of Child Witnesses to Suggestion: An Empirical Study," 4 Law & Hum. Behav. 201 (1980).

[12]Penrod, Bull, and Lengnick, "Children as Observers and Witnesses: The Empirical Data," 23 Fam.L.Q. 411, 422-27 (1989).

[13]Ceci, Ross & Toglia, "Age Differences in Suggestibility: Narrowing the Uncertainties," in *Children's Eyewitness Memory* 79-91 (S. Ceci, M. Togia & D. Ross eds. 1987) .

[14]*See e.g.*, Christiansen, "The Testimony of Child Witnesses: Fact, Fantasy, and The Influence of Pretrial Interviews," 62 Wash.L.Rev. 705, 707-11 (1987); Johnson & Foley, "Differentiating Fact From Fantasy: The Reliability of Children's Memory," 40 J. Soc. Issues 33, 44-45 (1984); Stafford, "The Child as a Witness," 37 Wash.L.Rev. 303, 309-10 (1962).

[15]Myers Brief at 17.

[16]The three authorities who are credited with having prepared Section II of the Myers Brief (*see* p.1) have all admitted in other settings that the research is too recent to support firm conclusions. *See* Goodman

(continued...)

reliability that is meaningful in a court of law. Instead, they confirm that a psychologist's interest in describing children is of a totally different order than the law's concern with a defendant's constitutional rights.

Two instances are illustrative.[17] The brief asserts: "In several studies, some including children as young as three years of age, researchers found that memory of stressful events is even more enduring than memory for nonstressful events in children." Myers Brief at 13. The cited study[18] concludes: "Not a single error in *free recall* was made by the highly stressed children" (emphasis added). Table 6 accompanying the article indicates, however, that the proportion of correct answers to different types of specific questions ranged from .25 to .82 for all the children, hardly an endorsement for concluding that children who have been exposed to stressful

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[16](...continued)
& Clarke-Stewart, *supra* note 11 at 16 ("Whether children would misconstrue events to the point that an allegation of abuse would result, is, based on our research, still debatable."); Saywitz, "Testimony: Age-Related Patterns of Memory Errors" 49, in *Children's Eyewitness Memory*, *supra* n.13 ("before generalizing to the legal setting, a transitional phase of research is needed . . ."); Bulkley, "The Impact of New Child Witness Research on Sexual Abuse Prosecutions" 215, in *Perspectives on Children's Testimony* (S. Ceci, D. Ross, M. Toglia eds. 1989) [hereinafter Bulkley] ("the amount of new research in the past five years on child witnesses is so overwhelming that it is difficult for researchers, not to mention others, to be aware of all the available studies and to draw conclusions from them about children's eyewitness abilities").

[17]Both of these illustrations relate to the article by Goodman, Rudy, Bottoms & Aman, "Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony," in *What Young Children Remember and Know* (R.Fivush & J.Hudson eds. in press) [hereinafter Goodman, Rudy]. This article is the work most frequently relied upon in the Myers brief.

[18]Goodman, Rudy at 38. The article analyzed interviews of 48 three to six year old children that were conducted within two weeks of the children receiving inoculations at a medical clinic.

situations will respond correctly to questioning.[19] Since the brief itself discloses that young children will recall little about an event unless questioned (Myers Brief at 12-15), the statistical significance of the free recall finding has little or no applicability to the real life situations with which a court must deal.

The Myers brief also asserts that children as young as four do not make significantly more false reports than older children in response to leading questions that seek to elicit information that might be relevant to abuse.[20] The text of the article, however, concedes that three of the 18 four year olds interviewed gave answers that "might lead to the suspicion of child abuse."[21] A 17% error rate for four year olds compared to a 7% error rate for seven year olds may have statistical significance

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[19]Goodman, Rudy at 63. No mention is made of whether the parents prepared these children for the inoculations by telling them what to expect, whether the children had ever been inoculated before at the same clinic, or anything about who these children were, or indeed how many of them were three years old.

[20]This conclusion stems from interviews of pairs of 18 four year olds and 18 seven year olds who either played Simon Says for 12 minutes with a male confederate of the authors or watched. The children were asked to relate everything that happened, and were then asked a series of misleading and specific questions, some of which concerned actions that might lead to an accusation of child abuse such as kissing and taking off clothes.

[21]One child answered that the man kissed her and the other child with whom she had been paired, and then added spontaneously "I am a boy. I pretend to be a boy every time." Goodman, Rudy *supra* note 17 at 23. A second child made commission errors about kissing and spanking. The third child claimed that the man had made the other child disappear, stated that a turtle flew through the air (there had been a puppet) but the boy never qualified his response, and stated that the man had put a hot dog in the other boy's mouth. *Id.* at 24. The authors commented: "Without knowing this little boy's terms for sexual anatomy, it is unclear how his response would be interpreted had he produced it in an actual investigation. It might well have caused concern, however." *Id.*

for psychologists. Statistical generalizations may not, however, override the Confrontation Clause's concern with accuracy in the individual case. *Cf. Coy v. Iowa*, 108 S.Ct. 2798, 2803 (1988)(something more than a generalized finding is needed to overcome the right to face-to-face confrontation).

2. The Circumstances Of The Interview

In contrast to these artificially created situations, reports of real life cases of suspected sexual abuse furnish numerous examples of how children can be manipulated during an interview. For example, in *State in Interest of R.W. v. J.L.W.*, 491 So.2d 652 (La.App.2d Cir. 1986), the juvenile court removed two minor children from the custody of their mother after hearing a child protection investigator testify that the three year, ten month old male child had "related how he and his mother played 'touch' games which he demonstrated with anatomically correct dolls, verbalizing that each touched the other's private parts." *Id.* at 654. The previous day the child had been interviewed by two sheriff's deputies for one hour and 23 minutes. Fortunately for the mother, the interview was videotaped.[22] All the judges, including the trial judge,

[22]Excerpts from the transcription of the videotape are included in the opinion. The child was first asked repeatedly if he played games without his clothes on with his mother. After numerous denials, the questioners shifted to asking about games played without any clothes on. (For example: ". . . I think I'll have to go and find [you] some toys in a little bit. I'm curious about those games you played without any clothes on. Who taught you to play those games?") *Id.* at 660 (emphasis omitted). "Deals" were offered: "*You tell me about these games you play without any clothes on* and I'll go see if I can't find you . . . handcuffs . . .you can play with if you want and also something that flies." *Id.* at 661 (emphasis in original). The child was told that daddy reported that he played with his mother without clothes on. He's shown a toy mouse, Twinkie, and told that Twinkie will find something for him to fly with if he tells them about the games, and

(continued...)

found the interview "tainted and suggestive" because of the questioning techniques used by the interviewers. *Id.* at 666. The child never admitted to sexual activities with the mother. *Id.* at 667. One appellate judge, who ultimately wrote the opinion reversing the judgment of the juvenile court, concluded that "[a]fter the videotape interview any child" would have become "preoccupied with human genitalia." *Id.* at 664-665.

Another glimpse of how pressured an interview can be comes from newspaper accounts of the McMartin child abuse prosecution in California. Jurors, questioned after the two defendants were acquitted on multiple counts, criticized the interviewing techniques used. "Videotapes showed what appeared to be the asking of leading questions and even pressure bordering on coercion to confirm the stories of other children."[23] The

[22](...continued)
that Twinkie knows that his mother touches him when he doesn't have clothes on. The transcript continues:

> *When did your mom put her mouth on your penis?*
> I don't know . . .
> *Where were you* . . . that's what Twinkie wants to know?
> . . . at my Dad's . . . in Monroe.
> *When mom put her mouth on your penis?*
> What?
> *Do you remember that happening? Did it happen?*
> No. I just dreamed about it . . .
> *Has momma ever put her mouth on your penis? Twinkie wants . . . the truth.*
> I didn't . . . She didn't
> Twinkie wants to know why you told us she did . . ."

Id. at 662 (emphasis in original).

[23]N.Y. Times, Jan. 20, 1990, sec. 1 at 12, col. 1. The story reported on excerpts from a videotape about questions to an 8-year-old child "about a game called 'Naked Movie Star' that was said to be played at the preschool. "Well, I didn't really hear it a whole lot," the child said. "I just heard someone yell it from out in the -- someone yelled

(continued...)

interviewers had been hired by the District Attorney's Office. Hechler, *The Battle and The Backlash* 154 (1988).

3. The Nature Of The Statement

The nature of Kathy's statement makes its reliability problematic and difficult to assess. Statements that are made contemporaneously and spontaneously while an event is occurring can be assessed by jurors in relation to the event. *Cf. United States v. Inadi*, 475 U.S. at 395-96 (co-conspirators' statements derive their value from the fact that they are made "while the conspiracy is in progress . . .").

Kathy's statement is like a statement at trial. It was elicited not by an event, but by an interviewer with an agenda. *Cf. id.* at 394 (testimony at trial "seldom has independent evidentiary significance of its own"). It was elicited, however, without any of the attendant safeguards that authorize admission of prior testimony. *California v. Green*, 399 U.S. at 165-68 (oath, cross-examination, and a record of the proceedings).

Kathy's statement relates to a past event, is not being reported in its entirety, contains too few details to

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[23](...continued)
it."

The story then reports the following exchange between the interviewer, holding an alligator puppet, and the child:

> MacFARLANE: Maybe, Mr. Alligator, you peeked in the window one day and saw them playing it, and maybe you could remember and help us. BOY: Well, no, I haven't seen anyone playing "Naked Movie Star." I've only heard the song.
>
> Q. What good are you? You must be dumb.
>
> A. Well, I don't really, ummm, remember anyone play that 'cause I wasn't there, when I . . . when people are playing it.
>
> Q. You weren't? You weren't. That's why we're hoping maybe you saw . . . See, a lot of these puppets weren't there, but they got to see what happened.

confirm its consistency with the supposed event,[24] and was elicited in response to leading questions designed to confirm the questioner's hypothesis. J.A.127-28. The jury cannot evaluate accurately whether her statement recounts a past event, or is the consequence of suggestive questioning in alien surroundings, in the presence of strangers, after undergoing what must have been an extremely unpleasant physical examination. In the absence of Kathy, the jury did not have the information needed to assess the appropriate weight to be given Kathy's statement.

4. The Nature Of The Witness

Dr. Jambura was not an ordinary fact witness, but an expert. Although Dr. Jambura did not explicitly state that Kathy was telling the truth, his testimony as a whole must certainly have been so understood by the jury. Dr. Jambura's credentials in working with sexually abused children, his experience in talking to children, his claim to find it "incredibly easy" to interview children (J.A. 120), and his acknowledgement that the naming of "daddy" strengthened his opinion that sexual abuse had taken place (J.A.118-19), all signaled to the jury that he interpreted Kathy's statements as meaning that she and her sister were being sexually abused within the family. Consequently, Kathy's statement was devastating to the defendant because it bolstered her sister's testimony, and therefore may have made the jury more willing to

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[24] Dr. Jambura testified:

> She would not -- oh, she did not talk any further about that. She would not elucidate what exactly -- what kind of touching was taking place, or how it was happening.

In this connection, it is interesting to note that in a recent study, the authors commented on false affirmative answers by 3 to 5-year olds to questions about their private parts: "It should also be noted that when the children made commission errors to the abuse questions, these errors consisted almost entirely of nods of the head without any elaboration or detail." Goodman, Rudy *supra* note 17 at 32.

believe the claim that her mother abetted the sexual abuse.

Courts have suggested that because of the aura of special reliability and trustworthiness surrounding expert testimony, an expert may never express an opinion about the credibility of another witness. *United States v. Azure*, 801 F.2d 336, 340-41 (8th Cir. 1986)(expert on child sexual abuse could not tell jury that he found child believable; "putting an impressively qualified expert's stamp of truthfulness on a witness' story goes too far"; he thereby "essentially told the jury" that Azure was the person who sexually abused her). *See also United States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988). Surely the danger to the accused is far greater when the expert validates the credibility of a declarant whom the defendant cannot confront. *See* Hutton, "Child Sexual Abuse Cases: Establishing the Balance Within the Adversary System," 20 J. of L. Reform 491 (1987). Interposing the expert between the declarant and the jury deprives the jury of its right to make determinations of credibility.

As a matter of evidentiary law, an expert may rely upon hearsay statements in reaching his or her conclusions, Idaho Rules of Evidence 703, but the expert's opinion must also be reconciled with the demands of the Confrontation Clause. Cross-examining the expert is not the equivalent of cross-examining the declarant upon whose statements the expert is relying in expressing his opinion.[25] To the contrary, the defendant may be deprived of his rights to confrontation if he has no access to the declarant upon whom the expert is relying. *Compare United States v. Rollins*, 862 F.2d 1282, 1294

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[25]This is not a case like *Delaware v. Fensterer*, 474 U.S. 15. In *Fensterer*, an expert could not remember the basis for his opinion. The *per curiam* opinion found that the Confrontation Clause was satisfied by cross-examination of the expert at trial. But the opinion noted that this was not a case in which a prior out-of-court statement was being introduced. *Id.* at 21.

(7th Cir. 1988)(testimony of FBI expert as to meaning of code words, which was based in part on pretrial interview with informant, did not violate defendants' right to confrontation; defendant had interviewed the informant prior to trial); *United States v. Affleck*, 776 F.2d 1451, 1458 (10th Cir. 1985)(no confrontation violation where government's expert related what he had been told by defendant's former employees, accountants and the Trustee in bankruptcy; court noted "that the appellant had sufficient access to his own former employees, accountants, and the Trustee in bankruptcy and could have countered their statements).

D. Corroborating Evidence Does Not Eliminate A Violation Of The Confrontation Clause

In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), this Court stated:

> While some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole . . . the focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial. It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to "confront[ation]" because use of that right would not have affected the jury's verdict.

Id. at 686 (citations omitted).

In *Van Arsdall*, the violation of confrontation consisted of an unwarranted restriction on the defendant's

ability to cross-examine a prosecution witness. In this case, the constitutional error is the failure of the declarant to appear as a witness. The *Van Arsdall* approach should be used in this situation as well. The pertinent inquiry remains: how did the lack of cross-examination affect the jury's assessment of Kathy Wright's statement? If confrontation is to be excused when corroborating evidence exists, the constitutional right conveyed by the Sixth Amendment will become meaningless. Prosecutors would be encouraged to rely on weak witnesses whom they would be able to bolster by hearsay evidence that would not violate the Confrontation Clause because it was corroborated. Such bootstrapping would spell an end to the constitutional right embodied in the clause, especially now that so many jurisdictions have enacted a residual hearsay exception identical to the one in this case pursuant to which courts may admit hearsay that does not, however, pass Confrontation Clause muster.

II. THE CONFRONTATION CLAUSE SHOULD, AT A MINIMUM, REQUIRE THE EXCLUSION OF A CHILD'S STATEMENT ELICITED BY PROSECUTORIAL AUTHORITIES AT AN UNRECORDED INTERVIEW

A. The Confrontation Clause Requires Special Safeguards When An Adversarial Trial Does Not Enable A Defendant To Meaningfully Challenge The Prosecution's Evidence

This Court has recognized that the Sixth Amendment protections will not adequately protect the defendant unless they are afforded at a meaningful time. As this Court has also recognized, a realistic assessment of the propensities of the police and the situation of the defendant may require the adoption of prophylactic rules as the instrumental means to further constitutional objectives. *See e.g., Massiah v. United States*, 377 U.S.

201 (1964)(post-indictment statements deliberately elicited from defendant by government agents may not be used against him at trial unless counsel was present).

When, as here, the adversary process at trial does not "compensat[e] for advantages of the prosecuting authorities," *United States v. Ash*, 413 U.S. 300, 314 (1973), additional protections are required to make the right to confrontation meaningful. In particular, an accused cannot protect himself effectively at trial against unrecorded statements elicited from a child by a prosecutorial agent. Such statements should therefore be barred, notwithstanding the existence of a residual hearsay exception, without the necessity of a case-by-case analysis under the Confrontation Clause.

B. Prosecutorial Interviews With Children In Child Sex Abuse Prosecutions Must Be Recorded In Order To Protect Defendant Against Unreliable Statements That Cannot Be Challenged Meaningfully At Trial

This Court has mandated prophylactic rules pursuant to the Sixth Amendment when the risk of erroneous convictions is high. The defendant's situation when he is accused of sexual abuse in an out-of-court statement by a young child is not unlike that of the defendant identified by an eyewitness at a pretrial lineup. In *United States v. Wade*, 388 U.S. 218 (1967), and the companion case of *Gilbert v. California*, 388 U.S. 263 (1967), this Court, mindful that "the annals of criminal law are rife with instances of mistaken identification," *Wade*, 388 U.S.at 228, expressed concern lest the potential for improper suggestion at the lineup deprive an accused of "meaningful examination of the identification witness' testimony at trial." *Stovall v. Denno*, 388 U.S. 293, 297 (1967). In language remarkably pertinent to the new problems posed by child sex abuse prosecutions, the Court explained in *Wade*:

> Insofar as the accused's conviction may rest on a courtroom identification in fact

the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. Pointer v. State of Texas, 380 U.S. 400. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional . . ."

388 U.S. at 235.

Wade and *Gilbert* mandate that an identification made at a lineup conducted in the absence of defendant's counsel -- the special safeguard selected by the Court to ensure reliability -- must be excluded at trial even though the statement would otherwise satisfy the hearsay rule,[26] and even though the statement is corroborated by other evidence.

[26]Federal (and Idaho) Rules of Evidence 801(d)(1)(C) provides: A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person."

Ordinarily, the prosecution interview of a potential witness is not an occasion "so pernicious that an extraordinary system of safeguards is required." *United States v. Ash*, 413 U.S. 300. Statements made at an ordinary witness interview will not satisfy a hearsay exception, and will be usable, if at all, only for impeachment. The opportunity to cross-examine the witness at trial will adequately protect the defendant and satisfy the demands of the Confrontation Clause. In child sex abuse prosecutions, however, the recent adoption of numerous special hearsay exceptions for the statements of children[27] means that the child's interview, as prone to pitfalls and hazards as eyewitness identification, may completely decide the guilt or innocence of the accused if the interview statements are admitted into evidence.[28] When, as here, the child is incompetent to testify, the adversary process contemplated by the Sixth Amendment is not available to defendant.[29] *See Barber v. Page*, 390 U.S. 719 (1968); *Douglas v. Alabama*, 390 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400.

Just as the annals of criminal law reveal numerous instances of mistaken identification, *Wade*, 388 U.S. at 228, so do recent events confirm that false accusations of child sexual abuse are not uncommon.[30] Researchers

[27]*See* Brief for Petitioner at 36, n.14.

[28]*Cf.* Uniform Rules of Evidence 807 (requires audio-visual recording of hearsay statements of children "describing an act of sexual conduct").

[29]Statements of identification, on the contrary, when admitted require production of the declarant at trial. *See United States v. Owens*, 108 S.Ct. 838.

[30]In the *McMartin* case in California, charges against five of the original seven defendants were dropped and the remaining two defendants were acquitted on 52 counts of molesting young children; a (continued...)

believe that the recent enormous increase in reports of child sexual abuse has been accompanied by a significant rise in unsubstantiated reports.[31] The importance of the child's statements, true or false, is highlighted by the fact that physical evidence of sexual abuse is rare.[32] Recent events also highlight the pivotal role of videotapes in illuminating unduly suggestive interview techniques.[33]

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[30](...continued)
mistrial was declared on the remaining 12 counts. N.Y. Times, Jan. 19, 1990, A1, col. 2. *See also* Matthews, *In California a Question of Abuse: An Excess of Child Molestation Cases Brings Kern County's Investigative Methods Under Fire*, Wash. Post, May 31, 1989 at D1 (attorney general's office concluded that children were overinterviewed, pressured and allowed to share one another's accounts). In Minnesota, a prosecutor was publicly rebuked for mishandling an investigation in which charges of sexual abuse against 21 of the 24 defendants were dropped. Two other defendants were acquitted. Shipp, *Prosecutor in Sex Case to Stay in Office*, N.Y. Times, Oct. 11, 1985 at A.15 col.2. *See generally* Eberle, *The Politics of Child Abuse* (1986).

[31]Two researchers recently concluded that "approximately 8 percent or more of the investigated cases may be fictitious." Raskin & Yuille, "Problems in Evaluating Interviews of Children in Sexual Abuse Cases" 184, 186, in *Perspectives on Children's Testimony* (S.Ceci, D.Ross and M.Toglia eds. 1989). Although one author has criticized this assertion as unfounded, *see* Bulkley, *supra* note 16 at 216, she herself acknowledges that there "has been a significant rise in unsubstantiated reports during this time." *Id.* at 208. Increased incidents of false accusations in matrimonial disputes have been reported, some of which have culminated in criminal charges. New York Times, Jan. 17, 1987 at A.14, col.2.

[32]Duggan, Aubrey, Doherty, Isquith, Levine and Scheiner, "The Credibility of Children as Witnesses in a Simulated Child Sex Abuse Trial" 71, 73, in *Perspectives on Children's Testimony*, *supra* ("The most commonly reported type of child sexual abuse is nonviolent genital manipulation, which would rarely cause any physical damage.").

[33]When interviewed after the McMartin verdict, the jurors indicated that they were swayed in favor of the defense by the videotaped interviews. N.Y. Times, Jan. 19, 1990, A.1, col.2. The public defender (continued...)

Although *Wade-Gilbert* has been limited to identification procedures taking place after adversarial judicial proceedings have been commenced, *see Kirby v. Illinois*, 406 U.S. 682 (1972), the "critical stage" requiring procedural safeguards for prosecution interviews of alleged victims of child sex abuse should not be so restricted. In the identification cases defendant is afforded a second line of defense, announced by the Court simultaneously with *Wade-Gilbert*: the right to have excluded from evidence the results of an identification procedure that was "unnecessarily suggestive and conducive to irreparable mistaken identification." *Stovall v. Denno*, 388 U.S. at 302. *See also Manson v. Brathwaite*, 432 U.S. 98 (1977). Thus, in identification situations, either the defendant will be a witness to the suggestiveness, or, in the case of photographs, the photographs will be available for reconstruction purposes. *Ash*, 413 U.S. at 324 (Stewart, concurring).

When the child does not testify or has had its memory altered by the interview, it is impossible to reconstruct the unrecorded interview of a child. Giving the defendant the burden of proving suggestiveness through cross-examination of the interviewer does not protect him adequately. As this Court said in *Wade*, cross-examination "cannot be viewed as an absolute assurance of accuracy and reliability." 388 U.S. at 235.[34]

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[33](...continued)
has expressed similar views. *See* "McMartin's Preschool Lessons," 76 A.B.A.J. 28 (1990)("[A] slam dunk for the prosecution" had interviews not been videotaped).

[34]*Pennsylvania v. Ritchie*, 107 S.Ct. 989 (1987), is not to the contrary. In that case, a child sex abuse prosecution, a plurality of the Court held that defendant could not rely on the Confrontation Clause to obtain information concerning the victim contained in a state agency file made confidential by statute. The majority found that defendant's right to a fair trial had not been violated because the state had required the agency to submit the file for judicial *in camera* review to (continued...)

C. The Idaho Supreme Court Properly Found That The Failure To Record Deprived Defendant Of Her Right To Confrontation

The Supreme Court of Idaho could properly find that the truth-seeking function of a trial is impaired by the use against defendant of statements elicited by the prosecution from a young child at an unrecorded interview. In an analogous situation, all members of this Court agreed that a state may protect itself against a class of evidence that posed too great a risk of unreliability.

In *Rock v. Arkansas*, 483 U.S. 44 (1987), although the majority held that a *per se* rule excluding *all* hypnotically enhanced testimony violated the defendant's right to compulsory process,[35] it indicated approval of state adopted procedural safeguards designed to reduce inaccuracies, such as the "[t]ape or video recording of all interrogations," *id.* at 60, as "a means of controlling overt suggestions." *Id.* at 61. *See also id.* at nn.16 & 19. Chief Justice Rehnquist and Justices White, O'Connor and Scalia dissented on the ground that the state was free to adopt a *per se* rule to exclude evidence "whose trustworthiness is inherently suspect." *Id.* at 64. The dissenters pointed out that the state court had observed that "a hypnotized individual becomes subject to suggestion, is likely to confabulate, and experiences artificially increased confidence in both true and false memories following hypnosis." *Id.* at 62.

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[34](...continued)
determine the presence of information "that may have changed the outcome of his trial had it been disclosed." *Id.* at 1004. In this case there is no way to protect the defendant unless a record is required.

[35]The majority noted that the *per se* rule prevented the defendant from testifying to the details of the homicide with which she was charged. *Id.* at 57. The majority reserved decision as to whether a state could adopt a *per se* exclusionary rule to bar testimony by previously hypnotized witnesses rather than the accused. *Id.* at 58, n.15.

Consistent with the concerns expressed in *Rock*, *amicus* proposes that a rule of exclusion is warranted whenever prosecutorial authorities interview a child after they have focused on the defendant and do not audio or videotape the interview.[36] Moreover, even if the statements are recorded, they must be excluded if they lack sufficient indicia of reliability to satisfy the Confrontation Clause.[37]

The proposed rule balances the needs of the state and the rights of the defendant at very little cost and inconvenience.[38] It is responsive both to the rights of the accused and to the self-evident proposition that prosecutors want to get convictions. *See Lee v. Illinois*, 476 U.S. at 544 (commenting on untrustworthiness of codefendant's "unsworn statement [that] was given in response to the questions of police, who, having already interrogated

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[36]Contrary to petitioners, we do not believe that the Idaho Supreme Court in fact created a prophylactic rule. In characterizing the decision below as having created "three inflexible conditions precedent," Brief of Petitioner at 42, the state seems to be substituting the *per se* language in the *concurring* opinion in *State v. Giles*, 772 P.2d at 202, regarding criteria for the admission of hearsay pursuant to a residual exception, for the language actually contained in the case that is being reviewed. In *Wright*, the Idaho court held that the particular statements at issue were untrustworthy "[b]ecause of the combined effect of her tender years and the suggestive, inadequately reviewable interview technique applied by Dr. Jambura." 775 P.2d at 1227.

[37]*Amicus* proposes the use of videotape in this context as a prophylactic rule. By contrast, the use of closed circuit television when a declarant is available to testify in person raises different and serious Confrontation Clause problems. The constitutionality of the latter procedure is before this Court in *Maryland v. Craig*, No. 89-478.

[38]The state's protests about not having equipment available when a child blurts out a statement are beside the point. This case concerns statements that are deliberately elicited by the police, or its agent. In 1990, it is highly unlikely that recording equipment will not be available. Also, this case does not involve statements derived in the course of an ongoing therapeutic relationship.

Lee, no doubt knew what they were looking for").[39] It recognizes that defendant cannot get a fair trial when he cannot rely on the adversary process at trial to challenge effectively the hearsay statements elicited by the police. Guidelines such as these will lead to more effective investigations because prosecutors will not be able to badger children into making highly questionable statements. A bright-line prophylactic rule can be effective in reducing undesirable prosecutorial behavior, and in securing more reliable evidence. Consequently, the objectives of the Sixth Amendment and the Confrontation Clause will be served.

[39]The *Lee* majority discounted the fact that the statement may have constituted a declaration against penal interest: "That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." *Id.* at 544.

CONCLUSION

The defendant in this case was doubly deprived of her right to confrontation. First, she was deprived of her right to confrontation because the jury could not assess accurately the weight to be given Kathy's out-of-court statements since Kathy did not testify at trial. Second, the hearsay account of Kathy's statements at an unrecorded prosecutorial interview should have been excluded because defendant's inability to challenge these statements effectively at trial deprived her of the fair trial guaranteed by the Sixth Amendment. The urgent need to stem the tide of sexual abuse directed at this nation's children cannot be achieved by dispensing with a criminal defendant's constitutional rights.

Respectfully submitted,

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